Juris Technologies Sdn Bhd & Anor v Foo Tiang Sin & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22IP-53–10 OF 2015
WONG KIAN KHEONG J
25 JUNE 2018

Civil Procedure — Contempt of court — Breach of court order — Ex parte order to compel respondent delivered electronic devices to applicant — Applicant alleged respondent breached order by deleting files in electronic devices — Whether applicants had to serve personally sealed ex parte order on respondent before deletion — Whether respondent breached ex parte restraining order — Whether sentences imposed to respondent appropriate in the public interest — Rules of Court 2012 O 45 r 7

The applicants obtained leave of the court to file this application (encl 41) to commit the respondent for contempt of court regarding the respondent's breach of an ex parte court order ('the ex parte order'). The ex parte order compelled the respondent to deliver to the applicants' supervising solicitors any laptop, notebook, iPad, digital and optical storage devices ('the electronic devices') in the respondent's possession and/or control, 'without turning on or off, accessing, altering, destroying, removing, transferring or otherwise tampering with' the electronic devices. The respondent did not apply to court to set aside the ex parte order. Nor did the respondent appealed to the Court of Appeal against the ex parte order. All the parties entered into a consent order which provided that all electronic devices delivered up to the applicants' supervising solicitor shall continue to be kept in the custody of the applicants' supervising solicitors for the purpose of preserving the integrity of evidence until the conclusion of the trial. The respondent's devices were handed by the applicants' supervising solicitor to the computer forensic expert appointed by the applicants and the preliminary forensic report stated, among others, that one folder which contained most of the first applicant's clients searched using a keyword 'JURIS', had been deleted and only the named and details of the deleted files could be recover but not their contents. The statement filed by the applicants had alleged that the respondent had breached the ex parte order by way of deletion and the contents of the deleted files were important evidence to establish the applicants' cause of action. The issues were: (a) whether the applicants are required to serve personally the sealed ex parte order on the respondent before deletion; (b) whether the respondent had breached the ex parte restraining order; and (c) whether the sentences imposed to the respondent were appropriate in the public interest.

Held:

(1) For the purpose of enforcing a restraining injunction, ex parte and inter partes, in an order or judgment, by way of committal proceedings against a party, there is no requirement to serve personally a copy of the sealed restraining order or judgment on the party if the party has already been notified of the terms of the restraining order or judgment. This is clear from the words 'subject to' in O 45 r 7(6) of the RC itself. An applicant in committal proceedings must prove beyond all reasonable doubt that the alleged contemnor has been notified of the terms of the restraining order or judgment (see para 19).

(2) A person can be notified of the terms of a restraining order/judgment within the meaning of the words 'or otherwise' in O 45 r 7(6)(b) of the RC by way of an email, facsimile or any electronic means. The respondent had been notified of the terms of the ex parte restraining order by way of the applicants' email. Accordingly, there is no requirement to serve personally a copy of the sealed ex parte restraining order on the respondent before the deletion (see para 19).

(3) A party cannot disobey the order/judgment by claiming that the party had not been legally advised. Accordingly, the respondent is legally bound to obey the ex parte order even if he did not have the benefit of legal counsel. If the court acceded to respondent's contention, this would confer on parties in legal proceedings a carte blanche to breach any order/judgment by deliberately not seeking legal advice. Such an outcome is clearly inimical to due administration of justice (see para 23).

(4) There was proof beyond all reasonable doubt that the respondent had intentionally breached the ex parte restraining order by deleting the folder in the respondent's laptop. The respondent's emails clearly showed that he was aware of the ex parte order. The respondent could have easily asked the applicant's solicitor on whether there would be a breach of the ex parte restraining order if he had deleted a file or folder in his laptop, but this was not done by the respondent (see para 24).

(5) The ex parte restraining order enjoined the respondent from deleting anything in his laptop. Consequently, even if it was assumed that the deleted files did not contain the confidential information, the respondent would still have breached the ex parte restraining order by deleting the folder. In any event, a perusal of the retrieved information showed the name of the first applicant. There was no reason why the respondent should keep information with the first applicant's name in his personal cloud and laptop (see para 24).

(6) Sentences were imposed for contempt of court in the exercise of the court's discretion. The exercise of such a discretion was depending on the particular facts of the case in question. As such, cases regarding sentences meted for contempt of court provided mere guidelines and could not

A constitute legal precedents from the view point of stare decisis doctrine. It is in the public interest for this court to impose the imprisonment sentence to send a clear message that all parties in proceedings shall obey strictly ex parte restraining order. The just and appropriate sentence for the respondent was a seven days imprisonment sentence. The respondent B shall pay RM20,000 to the applicant with interest at the rate of 5%pa. The stay of execution was granted pending the disposal of the respondent's appeal to the Court of Appeal (see paras 26 & 28–30).

[Bahasa Malaysia summary

C Permohon mendapatkan izin daripada mahkamah untuk memfailkan pemohonan ini (lampiran 41) untuk mengkomitkan responden dengan penghinaan mahkamah berkenaan dengan pelanggaran responden terhadap satu perintah mahkamah ex parte ('perintah ex parte tersebut'). Perintah ex D parte tersebut memerintahkan responden untuk menyerahkan kepada peguam pemohon apa-apa komputer riba, iPad, alat simpanan digital atau optikal ('alatan elektronik') dalam milikin dan/atau kawalan responden, tanpa menghidupkan atau memadamkan, mengakses, menukar, memusnahkan, memindahkan atau membuat kacau ganggu terhadap alatan elektronik E tersebut. Responden tidak memohon kepada mahkamah untuk mengetepikan perintah ex parte tersebut. Responden juga tidak merayu kepada Mahkamah Rayuan terhadap perintah ex parte tersebut. Semua pihak telah memasuki ke dalam satu penghakiman persetujuan yang memperuntukkan sema alat elektronik diserahkan kepada peguam pemohon akan terus disimpan dalam F kawalan peguam pemohon untuk tujuan memelihara integriti keterangan sehingga penyelesaian perbicaraan. Alatan responden telah diserahkan oleh peguam pemohon kepada pakar forensik komputer yang dilantik oleh pemohon dan laporan forensik awal menyatakan, antaranya, satu folder yang mengandungi kebanyakan carian klien menggunakan kata kunci 'JURIS', G telah dipadamkan dan hanya butiran dan nama fail yang dipadamkan boleh diselamatkan tetapi bukan isi kandungannya. Pengataan yang difailkan oleh pemohon mengatakan bahawa responden telah melanggar perintah ex parte tersebut dengan memadamkan kandungan fail yang dipadamkan adalah keterangan penting untuk membuktikan kausa tindakan pemohon. Isu untuk H diputuskan adalah: (a) sama ada pemohon perlu untuk menyerahkan secara kendiri perintah ex parte yang dimeterai kepada responden sebelum dipadamkan; (b) sama ada responden telah melanggar perintah ex parte tersebut; dan (c) sama ada hukuman yang dikenakan terhadap responden adalah bersesuaian dengan kepentingan awam.

I **Diputuskan**:

(1) Untuk tujuan melaksanakan satu injunksi menghalang, ex parte dan inter parte, dalam satu perintah atau penghakiman, dengan cara prosiding pengkomitan terdapat satu pihak, tiada keperluan untuk

menyerahkan secara kendiri sesalinan perintah atau penghakiman menghalang tersebut yang dimateraikan sekiranya pihak tersebut telahpun dimaklumkan akan terma perintah atau penghakiman menghalang tersebut. Ini adalah jelas daripada perkataan 'tertakluk kepada' dalam A 45 k 7(6) KKM. Seorang pemohon dalam prosiding pengkomitan perlu membuktikan melampaui sebarang keraguan munasabah bahawa orang yang melakukan penghinaan tersebut telah dimaklumkan akan terma perintah atau penghakiman menghalang tersebut (lihat perenggan 19).

(2) Seorang individu boleh dimaklumkan akan terma perintah/penghakiman menghalang tersebut dalam makna perkataan 'atau sebaliknya' dalam A 45 k 7(6)(b) KKM melalui emel, faks atau apa-apa cara elektronik. Responden telah dimaklumkan akan terma perintah larangan ex parte tersebut melalui emel pemohon. Oleh itu, tiada keperluan untuk menyerahkan secara kendiri salinan perintah menghalang ex parte yang telah dimeterai kepada responden sebelum ianya dipadamkan (lihat perenggan 19).

(3) Satu pihak tidak boleh ingkar perintah/penghakiman dengan mengatakan bahawa pihak tersebut tidak menerima nasihat undang-undang. Oleh itu, responden adalah bertangungan di sisi undang-undang untuk mematuhi perintah ex parte tersebut walaupun dia tidak mempunyai nasihat undang-undang. Sekiranya mahkamah akur dengan hujah responden, ini akan membenarkan pihak-pihak dalam prosiding undang-undang satu kebenaran untuk melanggar apa-apa perintah/penghakiman dengan sengaja tidak mendapatkan nasihat undang-undang. Kesan sedemikian adalah jelas mengancam pelaksanaan keadilan (lihat perenggan 23).

(4) Wujud bukti melampaui sebarang keraguan munasabah bahawa responden telah dengan sengaja melanggar perintah menghalang ex parte dengan memadamkan folder dalam komputer riba responden. Emel responden dengan jelas menunjukan bahawa dia mengetahui akan perintah ex parte tersebut. Responden boleh dengan mudahnya bertanya kepada peguam pemohon akan asam ada akan wujud satu pelanggaran terhadap perintah melaksanakan ex parte tersebut sekiranya dia memadamkan satu fail atau folder dalam komputer ribanya, ini tidak dilakukan oleh responden (lihat perenggan 24).

(5) Perintah menghalang ex parte tersebut menghalang responden daripada memadamkan apa-apa dalam komputer ribanya. Oleh itu, jikalau ianya dianggap bahawa fail yang dipadamkan tidak mengandungi maklumat sulit, responden tetap akan melanggar perintah menghalang ex parte dengan memadamkan folder tersebut. Dalam apa keadaan sekalipun, satu pemeriksaan maklumat yang diperoleh menunjukan nama pemohon pertama. Tiada apa-apa sebab mengapa responden patut

menyorokkan maklumat dengan nama pemohon pertama dalam komputer riba dan 'cloud' peribadinya (lihat perenggan 24).

(6) Hukuman yang dikenakan untuk penghinaan mahkamah dalam pelaksanaan budi bicara mahkamah. Pelaksanaan budibicara tersebut bergantung kepada fakta kes berkenaan. Oleh itu, kes berkenaan dengan hukuman yang dikenakan untuk penghinaan mahkamah memperuntukkan garis panduan dan tidak terjumlah kepada precedent undang-undang daripada pandangan doktrin stare decisis. Ianya adalah dalam kepentingan awam untuk mahkamah ini mengenakan hukuman pemenjaraan untuk menghantar mesej yang jelas bahawa semua pihak dalam prosiding akan mematuhi secara tegas satu perintah menghalang ex parte. Hukuman yang adil dan sesuai untuk responden adalah satu tempoh pemenjaraan tujuh tahun. Responden juga akan mambayar RM20,000 kepada pemohon dengan kadar imbuhan sebanyak 5%pa. Pengangguhan pelaksanaan dibenarkan sementara menantikan penyelesaian rayuan responden ke Mahkamah Rayuan (lihat perenggan 26 & 28–30).]

Notes

For cases on breach of court order, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2437–2464.

Cases referred to

BP Singapore Pte Ltd v Quek Chin Thean and others [2011] 2 SLR 541, HC (folld)

BYD Auto Industry Co Ltd v Amdac (M) Sdn Bhd [2017] 11 MLJ 513; [2017] 5 CLJ 371, HC (refd)

Class One Video Distributors Sdn Bhd & Anor v Chanan Singh a/l Sher Singh & Anor [1997] 5 MLJ 209, HC (refd)

EMI Records Ltd v Ian Cameron Wallace Ltd and another [1982] 2 All ER 980, Ch D (refd)

Foo Khoon Long v Foo Khoon Wong [2009] 9 MLJ 441, HC (refd)

Ipmuda Trading Sdn Bhd v Khoo Kiat Piau t/a Ying's Trading Co & Anor [1996] 5 MLJ 637; [1997] 1 CLJ Supp 158, HC (refd)

Lock International plc v Beswick & Ors [1989] 1 WLR 1268, Ch D (refd)

Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors [2012] 3 MLJ 458, FC (refd)

Visiber Sdn Bhd v Tan Meng Them & Ors [2010] 7 MLJ 537, HC (refd)

Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal [1995] 3 MLJ 549, FC (refd)

Legislation referred to

Contempt of Courts Act 1971[IND] s 12(1)

Contempt of Court Act 1981 [UK] s 14(1)

Rules of Court 2012 O 1 r 4(1), O 45 rr 5(1), (6), 7(2), (2)(a), (6), (6)(b), O 52 rr 3(1), (2), 7(1), 8(1), (2), 9, O 59 rr 3(1), (2), 16(2), (2)(a), (3), (4), 24, O 62 rr 1(1), 3
Subordinate Court Rules 1980 O 30 r 7(6)

Eddie Chuah Seong Eng (Derrick Leong Tjen Ming with him) (Wong & Partners) for the applicants.
Steven Cheok Hou Cher (Ng Kim Poh with him) (Christopher & Lee Ong) for the respondents.

Wong Kian Kheong J:

INTRODUCTION

[1] The plaintiffs ('the applicants') obtained leave of this court to file this application (encl 41) to commit the first defendant ('the respondent') for contempt of court regarding the respondent's breach of an ex parte court order (ex parte order). The ex parte order, among others, compelled the respondent to deliver to the applicants' supervising solicitors any laptop, notebook, iPad, digital and optical storage devices ('electronic devices') in the respondent's possession and/or control.

[2] Enclosure 41 concerns the following issues:

(a) whether the applicants are required under O 45 r 7(2)(a) of the Rules of Court 2012 ('the RC') to serve personally an original copy of the sealed ex parte order on the respondent when a copy of the sealed ex parte order has been attached to an email sent by the applicants' solicitors to the respondent. This question concerns the construction of O 45 r 7(2)(a), (6)(b) and O 62 r 3 of the Rules of Court 2012;

(b) did the respondent breach the ex parte order? In this regard, whether the respondent can rely on a defence that he has not been legally advised at the material time; and

(c) what is the appropriate sentence in the public interest for a contravention of the ex parte order?

BACKGROUND

[3] Azizah Nawawi J granted the ex parte order as follows, among others:

(a) an order to compel, among others, the respondent, 'to immediately deliver up to the ('applicants') supervising solicitors' electronic devices in the possession and/or control of the respondent, 'without turning on or off, accessing, altering, destroying, removing, transferring or otherwise tampering with' the electronic devices; and

(b) the electronic devices delivered to the applicants' supervising solicitors are to be kept in the custody of the applicants' supervising solicitors for the purpose of preserving the integrity of evidence until further direction from the court and/or to be tendered as evidence at the trial of this action.

[4] The applicants' solicitors sent a letter dated 2 November 2015 to the respondent (the applicants' letter dated 2 November 2015) which informed the respondent of the following matters, among others:

(a) the applicants had obtained the ex parte order. A copy of the sealed ex parte order was enclosed with the applicants' letter dated 2 November 2015;

(b) the contents of the ex parte order had been stated in the applicants' letter dated 2 November 2015; and

(c) the respondent was given notice that failure to comply with the ex parte order, 'including any attempts to turn off or on, accessing, altering, destroying, removing, transferring or otherwise tampering with' the electronic devices 'constitutes a contempt of court and committal proceedings will be initiated against' the respondent.

[5] The applicants' solicitor sent an email at 1.17pm, 3 November 2015 to the respondent (the applicants' email dated 3 November 2015) which, among others:

(a) informed the respondent of the contents of the ex parte order. A copy of the sealed ex parte order and the applicants' letter dated 2 November 2015 were attached to the applicants' email dated 3 November 2015; and

(b) gave notice to the respondent that failure to comply with the ex parte order, 'including any immediate attempts to turn off or on, alter, destroy, delete, remove, transfer, install or otherwise tampering with' the electronic devices 'constitutes a contempt of court and committal proceedings will be initiated against' the respondent.

[6] In reply to the applicants' email dated 3 November 2015, the respondent sent two emails at 2.03pm ('the respondent's first email') and 3.14pm ('the respondent's second email') on the same day 3 November 2015.

[7] The respondent's first email stated as follows:

> *Your demand is duly noted. My partners and I are currently in Brunei and to see you tomorrow is a bit short notice [sic]. I seek your understanding first to allow me to appoint a lawyer and give time for my appointed lawyer and I to review the cover letter before proceeding.* (Emphasis added.)

[8] According to the respondent's second email: A

> *We are having User Acceptance Testing (UAT) next week 9/11/205 [sic] in Brunei. The whole team including those individually named as defendants are in Brunei to standby [sic]. Can the submission date be negotiated?* (Emphasis added.)

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[9] On 4 November 2015 in Kuala Lumpur International Airport 2 ('KLIA 2'):

(a) the applicants' solicitors served personally, among others, a copy of the sealed ex parte order on the respondent; and

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(b) the respondent handed his mobile phone, laptop and a thumb drive ('the respondent's devices') to the applicants' supervising solicitors.

[10] On 5 November 2015:

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(a) the respondent's devices, among others, were handed by the applicants' supervising solicitors to Siaga Informatics Sdn Bhd ('Siaga') in the office of the applicants' supervising solicitors and in the presence of the respondent, the respondent's solicitors and applicants' solicitors. Siaga is the computer forensic expert appointed by the applicants in this case; and

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(b) Siaga conducted an imaging process of, among others, the respondent's devices to extract all information from the respondent's devices (for the purpose of Siaga's forensic examination). This process was carried out in the presence of the applicants' solicitors, applicants' supervising solicitors, respondent and respondent's solicitors.

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[11] Siaga's 'Preliminary forensic report' stated, among others, as follows:

(a) a search of the respondent's laptop using a keyword '*JURIS*' (part of the name of the first applicant company (first applicant)) showed one folder (named 'client') which contained most of the first applicant's clients ('folder');

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(b) the entire folder (which contained files) had been deleted ('deleted files'). Siaga could only recover the names and details of the deleted files but not their contents; and

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(c) the folder was deleted within a time range of 8:27:27pm to 8:28:25pm, 3 November 2015.

[12] The respondent did not apply to court to set aside the ex parte order. Nor did the respondent appeal to the Court of Appeal against the ex parte order. In fact, all the parties in this action, including the respondent, entered into a consent order dated 30 November 2015 ('consent order') which provided, among others, that all electronic devices delivered up to the

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applicants' supervising solicitors, shall continue to be kept in the custody of the applicants' supervising solicitors for the purpose of preserving the integrity of evidence until the conclusion of the trial of this suit.

ENCLOSURE 41

[13] The applicants obtained ex parte leave of this court under O 52 r 3(1) of the RC to cite the respondent for contempt of court in respect of the respondent's breach of the ex parte order (ex parte leave). Enclosure 41 has been filed pursuant to the ex parte leave.

[14] The respondent filed two affidavits to oppose encl 41 on the following grounds:

(a) the respondent had not been served with the sealed ex parte order when he entered appearance in this suit;

(b) the respondent had agreed to the consent order and had filed an affidavit to confirm that he had complied with the consent order ('the respondent's compliance affidavit');

(c) when the respondent received a copy of the sealed ex parte order, the applicants' letter dated 2 November 2015 and the applicants' email dated 3 November 2015, the respondent had not obtained legal advice;

(d) on 9 November 2015, the respondent's solicitors had discussed with the applicants' solicitors regarding the execution of the ex parte order ('discussion'). At the discussion, the respondent's solicitors had informed the applicants' solicitors that the respondent had not concealed anything and would co-operate fully with the applicants regarding the enforcement of the ex parte order;

(e) the respondent claimed that he had not breached the ex parte order because the deleted files contained documents and information which had been downloaded from his 'Personal Cloud'. The deleted files did not contain confidential information owned by the applicants ('confidential information'); and

(f) when the respondent was asked about the deletion of the folder ('deletion') during Siaga's forensic examination of the respondent's devices, he immediately admitted the deletion and 'volunteered' to provide the contents of the deleted files by downloading from his Personal Cloud. The respondent then downloaded the contents of the deleted files from his Personal Cloud into a thumb drive ('thumb drive') and handed the thumb drive to Siaga. A copy of the contents of the thumb drive has been exhibited in exh 'FTS3' in the respondent's first affidavit affirmed on 6 October 2017.

[15] In the Federal Court case of *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458, at paras 36–37, Arifin Zakaria CJ has decided that the statement filed by an applicant in committal proceedings under O 52 r 3(2) of the RC constitutes the 'charge' against an alleged contemnor.

[16] In this case, the statement filed by the applicants had alleged that the respondent had breached the ex parte order by way of the deletion and the contents of the deleted files were 'important evidence to establish' the applicants' causes of action in this suit.

WHETHER THE APPLICANTS HAD TO SERVE PERSONALLY THE SEALED EX PARTE ORDER ON RESPONDENT BEFORE DELETION

[17] I reproduce below the relevant parts of O 45 rr 5(1), (6), 7(2), O 62 rr 1(1) and 3 of the RC:

O 45 r 5(1) Where —

(a) ...; or

(b) *a person disobeys* a judgment or *order requiring him to abstain from doing an act*,

then, subject to these Rules, the judgment or order may be enforced by one or more of the following means:

(A) with the leave of the Court, an order of committal;

...

Service of copy of judgment or *order prerequisite to enforcement under rule 5*

O 45 r 7(1) ...

(2) *Subject to* Order 26, rule 7(3), and *paragraphs (6)* and (7) *of this rule, an order shall not be enforced under rule 5 unless —*

(a) *a copy of the order had been served personally on the person required to do or abstain from doing the act in question*; and

(b) in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act.

...

(6) *An order requiring a person to abstain from doing an act may be enforced under rule 5 notwithstanding that service of a copy of the order has not been effected in accordance with this rule if the Court is satisfied that, pending such service, the person against whom or against whose property it is sought to enforce the order has had notice thereof either —*

(a) by being present when the order was made; or

A (b) *by being notified of the terms of the order, whether by telephone, telegram or otherwise.*

...

When personal service required

B O 62 r 1(1) *Any document which by virtue of these Rules is required to be served on any person need not be served personally unless the document is one which by an express provision of these Rules* or by order of the Court *is required to be so served*.

Personal service: How effected

C O 62 r 3 *Personal service of a document is effected by leaving a copy of the document with the person to be served* and, if so requested by him at the time when it is left, showing him —

(a) in the case where the document is a writ or other originating process, the sealed copy; and

D (b) in any other case, an office copy. (Emphasis added.)

[18] Firstly, the ex parte order requires, among others, the respondent:

E (a) to abstain from 'turning on or off, accessing, altering, destroying, removing, transferring or otherwise tampering with' the respondent's devices (ex parte restraining order); and

(b) to deliver immediately the respondent's devices to the applicants' supervising solicitors (ex parte mandatory order).

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[19] I am of the following view:

(a) for the purpose of enforcing a restraining injunction, ex parte and inter partes, in an order or judgment (order/judgment) by way of committal proceedings against a party, there is no requirement to serve personally a copy of the sealed restraining order/judgment on the party if the party has already been notified of the terms of the restraining order/judgment. This because the requirement to serve personally a copy of the sealed restraining order/judgment under O 45 r 7(2)(a) of the RC is 'subject to' O 45 r 7(6) of the RC. This is clear from the words 'subject to' in O 45 r 7(2) of the RC itself. This interpretation is supported by the following three High Court judgments:

(i) in *Class One Video Distributors Sdn Bhd & Anor v Chanan Singh a/l Sher Singh & Anor* [1997] 5 MLJ 209 at pp 213–216, Haidar J (as he then was) decided as follows:

> It is not disputed that there was non-compliance of the statutory Form 87 by the second plaintiff and the question was whether the failure to indorse the penal notice therein was fatal to the second plaintiff's application. Counsel for the second defendant relied on *Leow Seng Huat v Low Mui Yein* [1996] 5

MLJ 381, where the learned judge held that failure to insert the penal indorsement in the order was fatal to the application, citing the cases of *Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor* [1988] 2 MLJ 239 and *Iberian Trust Ltd v Founders Trust & Investment Co Ltd* [1932] 2 KB 87 in support thereof.

In the case of *Messrs Hisham, Sobri & Kadir*, the learned judge did not have the benefit of considering the cases of *Allport Alfred James v Wong Soon Lam* [1989] 1 MLJ 338 and *Sofroniou v Szetti* [1991] FCR 332 which were reported later. However, in respect of *Leow Seng Huat*'s case, the two cases referred to by me were not brought to the attention and consideration of the learned judge. No doubt the two cases are not Malaysian cases but the wording in our O 45 r 7(4) of the RHC is similar to Singapore's O 45 r 7(4) and the English O 45 r 7(4)(a). In that event, if the two cases were brought to the attention of Hishamuddin J and argued, I have no doubt that the learned judge would have exercised his discretion accordingly. In fact, the Singapore Court of Appeal in the case of *Allport Alfred James* — quoting with approval the English case of *Sofroniou v Szetti* [1991] FCR 332 in allowing the appeal ...

The issue before the Singapore Court of Appeal in Allport Alfred James turned on the construction of O 45 r 7(6), which is in pari materia with our O 45 r 7(6). In construing O 45 r 7(6), it is necessary to look at the relevant parts of r 7. The circumstances for the court to invoke its discretionary power under O 45 r 7(6) are well set out in the judgment of Allport Alfred James and in my view it is appropriate therefore for me to set them out in extenso (at pp 387–389):

> The issue in this appeal turned on the construction of O 45 but it is necessary to look at other relevant parts of r 7. First, under r 7(2)(a), an order, and, in this case, the injunction, should not be enforced unless 'a copy of the order has been served personally on the person required to do or abstain from doing the act in question'.
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> ...
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> The important point to note in this provision is that the penal notice must be indorsed on the copy of the order 'served under this rule' and service under this rule means the personal service under r 7(2)(a). Once these two requirements are complied with, the order may be enforced by an order of committal under O 45 r 5. *However, in the case of an order requiring a person to abstain from doing an act, the court, under O 45 r 7(6), is empowered in certain circumstances to enforce the order, notwithstanding that the service of a copy of the order has not been effected in accordance with this rule ...*
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> ...
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> The question is what is meant by the words 'service of a copy of the order has not been effected in accordance with this rule'. The words 'this rule' clearly mean r 7, and service effected in accordance with r 7 means in accordance with r 7(2)(a) and (4), ie service of a copy of the order with the penal notice indorsed on it. *It been served personally, eg by registered post, or*

> *if it has been served personally but the copy served does not contain the penal notice, then the service of the copy of the order has not been effected 'in accordance with this rule', ie r 7. In such a case, the court has a discretion under r 7(6) to enforce the order if the following condition is satisfied, namely, the person against whom the order sought to be enforced has had notice thereof either*:
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> (a) by being present when the order was made, or
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> (b) *by being notified of the terms of the order, whether by telephone, telegram or otherwise*.
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> ...
>
> *In this case, though the order was not personally served on the second defendant, I am satisfied that the second defendant — having had the benefits of counsel's advice is deemed to know of the terms of the order. In any event, the second defendant did not deny that he had knowledge of the terms of the order. The word 'otherwise' in r 7(6) would be wide enough to cover this situation. In the circumstances, the conditions under r 7(6) would have been satisfied though the order did not contain the penal notice required under r 7(4). Though the service of the copy of the order had not been 'effected in accordance' with r 7 — as I said earlier — the second defendant had full knowledge of the terms of the order and the order was for the second defendant to abstain from doing certain acts. In other words, the court has a discretion to enforce the order if the court was satisfied that the second defendant had notice of the order in one of the ways specified in sub-paras (a) and (b) of para 6 of* O 45 r 7 of the RHC. I am so satisfied. (Emphasis added.)

(ii) *Ipmuda Trading Sdn Bhd v Khoo Kiat Piau t/a Ying's Trading Co & Anor* [1996] 5 MLJ 637; [1997] 1 CLJ Supp 158 concerned the then applicable O 30 r 7(6) of the Subordinate Court Rules 1980 (which is identical to O 45 r 7(6) of the RC). Augustine Paul JC (as he then was) held as follows in *Ipmuda Trading*, at p 164:

> Although a person cannot be held guilty of contempt in infringing an order of the Court of which he knows nothing Lyell J said in *Husson v Husson* [1962] 3 All ER 1956 that *a distinction is to be drawn between mandatory and prohibitory orders* and added:
>
> > *An order requiring a person to do an act must be served on him. If it is not served, committal proceedings for breach of the order do not lie. If, however, the order is to restrain the doing of an act, the person restrained may be committed for breach of it if he in fact has notice of it, either by his presence in Court when it is made, or by being served with it, or notified of it by telegram or in any other way.*
>
> *Where* a judgment or order has been served on a person or *he has had notice of it as provided by the rules then a breach of it may be enforced by an order of committal*. (Emphasis added.); and

(iii) *Class One Video Distributors* has been followed by Azahar Mohamed J (as

he then was) in *Visiber Sdn Bhd v Tan Meng Them & Ors* [2010] 7 MLJ 537, at paras 9–11;

(b) an applicant in committal proceedings must prove beyond all reasonable doubt that the alleged contemnor has been notified of the terms of the restraining order/judgment — please see VT Singham J's decision in the High Court case of *Foo Khoon Long v Foo Khoon Wong* [2009] 9 MLJ 441 at para 8;

(c) a person can be notified of the terms of a restraining order/judgment within the meaning of the words 'or otherwise' in O 45 r 7(6)(b) of the RC by way of an email, facsimile or any electronic means. In this case, the respondent had been notified of the terms of the ex parte restraining order by way of the applicants' email dated 3 November 2015. Such a fact is confirmed by the respondent's first and second emails. Accordingly, by reason of O 45 r 7(6)(b) of the RC, there is no requirement under O 45 r 7(2)(a) of the RC to serve personally a copy of the sealed ex parte restraining order on the respondent before the deletion; and

(d) in any event, in accordance with O 45 r 7(2)(a) of the RC, a 'copy' of the sealed ex parte order has been 'served personally' on the respondent by way of the applicants' email dated 3 November 2015. This decision is premised on the following reasons:

(i) the word 'copy' in O 45 r 7(2)(a) of the RC has been widely defined in O 1 r 4(1) of the RC to mean 'anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly'. A copy of the sealed ex parte order attached to the applicants' email dated 3 November 2015 comes within the meaning of the word 'copy' (as interpreted in O 1 r 4(1) of the RC) in O 45 r 7(2)(a) of the RC; and

(ii) the manner of personal service of an order/judgment in O 45 r 7(2)(a) of the RC is provided in O 62 r 3 of the RC. According to O 62 r 3 of the RC, an order/judgment is served personally on a person by leaving a copy of the sealed order/judgment with the person to be served. A copy of the sealed ex parte order attached to the applicants' email dated 3 November 2015 had been left with the respondent within the meaning of O 62 r 3 of the RC as admitted in the respondent's first and second emails. The respondent's first and second emails did not request for an original copy or an office copy of the sealed ex parte order.

[20] Based on the evidence and reasons stated in the above para 19, I have no hesitation to reject the respondent's contention that he had not been served personally with a copy of the sealed ex parte order before the deletion.

A WHETHER THE RESPONDENT HAD BREACHED EX PARTE RESTRAINING ORDER

[21] It is not disputed that the applicants have the legal burden to prove beyond all reasonable doubt that the respondent has breached the ex parte restraining order by way of the deletion — please see Wan Adnan FCJ's (as he then was) judgment in the majority decision of the Federal Court in *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1995] 3 MLJ 549 at p 574.

[22] Firstly, encl 41 does not concern the consent order. Hence, the fact that the respondent had complied with the consent order by affirming the respondent's compliance affidavit, is not relevant in the determination of encl 41.

[23] Secondly, I am of the view that a party in a proceedings is legally bound to obey:

(1) a mandatory and/or restraining order/judgment once the party has been served personally with the mandatory and/or restraining order/judgment under O 45 r 7(2)(a) of the RC; and

(2) a restraining order/judgment when the party has been notified of the terms of the restraining order/judgment within the meaning of O 45 r 7(6)(b) of the RC.

Once the circumstances explained in the above sub-para (1) and/or (2) have happened, a party cannot disobey the order/judgment by claiming that the party has not been legally advised. As explained in the above para 19, the respondent had already been notified of the terms of the ex parte restraining order and/or had been served personally with a copy of the sealed ex parte order. Accordingly, the respondent is legally bound to obey the ex parte order even if he does not have the benefit of legal counsel. If I have acceded to the above contention of the respondent, this will confer on parties in legal proceedings a carte blanche to breach any order/judgment by deliberately not seeking legal advice. Such an outcome is clearly inimical to due administration of justice.

[24] There is proof beyond all reasonable doubt that the respondent had intentionally breached the ex parte restraining order by deleting the folder in the respondent's laptop. This decision is based on the following evidence and reasons:

(1) the respondent's first and second emails clearly showed that he was aware of the ex parte order. In fact, the respondent's second email requested for an extension of time for him to comply with the ex parte order;

(2) the deletion is intentional because:

(a) in view of the respondent's first and second emails, he had established communication with the applicants' solicitors. In a borderless 'digital world' where messages and/or emails can be easily sent through any electronic device (eg 'smart' mobile phone, laptop or iPad), the respondent could have easily asked the applicants' solicitors on whether there would be a breach of the ex parte restraining order if he had deleted a file or folder in his laptop. However, this was not done by the respondent;

(b) a file or folder in any computer, including a laptop, cannot be 'easily' deleted by way of a mistake. I rely on the following judgment of Lai Siu Chiu J in the Singapore High Court case of *BP Singapore Pte Ltd v Quek Chin Thean and others* [2011] 2 SLR 541 at para 53:

> [53] *Foo admitted to deleting the two documents but claimed that this was done inadvertently. I did not believe him. I had pointed out to his counsel that it was impossible for anyone to inadvertently delete specific files from a computer because the person would have had to select the file in question and give the command for it to be deleted. Even after such a command had been given, there would be a prompt by the computer asking the person to confirm his decision. The more likely story was that Foo had panicked after the execution of the search order and had attempted to dispose of the remaining files in his possession which might incriminate him. I took a very dim view of his actions* ... (Emphasis added.); and

(c) if the respondent had inadvertently deleted the folder:

(i) the respondent could have easily downloaded the contents of the deleted files from his personal cloud and re-saved those contents in his laptop before he handed the laptop to the applicants' supervising solicitors in KLIA 2;

(ii) the respondent could have informed the applicants' solicitors by way of email regarding the deletion;

(iii) when the respondent handed the respondent's devices to the applicants' supervising solicitors in KLIA 2, the respondent could have informed the applicants' solicitors and the applicants' supervising solicitors regarding the deletion;

(iv) when the applicants' supervising solicitors handed the respondent's devices to SIAGA (handing-over), the respondent could have informed SIAGA, the applicants' solicitors and/or the applicant's supervising solicitors regarding the deletion. It is to be noted that three of the

respondent's solicitors were present during the handing-over and the respondent could have easily informed his solicitors regarding the deletion and his solicitors could then inform the same to SIAGA, the applicant's solicitors and/or the applicant's supervising solicitors; and

(v) at any time before the applicants obtained the ex parte leave, the respondent could have informed his solicitors regarding the deletion and in such an event, the respondent's solicitors could in turn inform the applicants' solicitors of the deletion; and

(3) the ex parte restraining order enjoined the respondent from, among others, deleting anything in his laptop. The ex parte restraining order did not concern the confidential information. Consequently, even if it is assumed that the deleted files did not contain the confidential information, the respondent would still have breached the ex parte restraining order by deleting the folder. In any event, a perusal of the retrieved information shows the name of the first applicant. There is no reason why the respondent should keep information with the first applicant's name in his personal cloud and laptop.

WHAT IS APPROPRIATE SENTENCE FOR THE RESPONDENT?

[25] When the court finds a person guilty of contempt of court, the court has a discretion to impose the following sentence on the contemnor:

(a) under O 52 r 7(1) of the RC, the court may suspend the execution of the order of committal:

(i) for any period of time; and/or

(ii) based on any term or condition

— as may be specified by the court.

When the court suspends the execution of a committal order according to O 52 r 7(1) of the RC, the court may admonish, caution or reprimand the contemnor;

(b) the court may discharge a contemnor pursuant to O 52 r 8(1) and (2) of the RC;

(c) the court may order a contemnor to give security for his or her good behavior (*security for good behaviour*). The court's power to order security for good behaviour has been preserved by O 52 r 9 of the RC;

(d) the court may impose a fine to be paid by a contemnor. This power has been retained by O 52 r 9 of the RC. When the court orders a fine to be paid by a contemnor, the court may specify:

(i) a time period for the contemnor to pay the fine;

(ii) the fine to be paid in instalments; and/or

(iii) a period of imprisonment of the contemnor in the event the contemnor fails to pay the fine — please see Noorin Badaruddin JC's (as she then was) judgment in the High Court case of *BYD Auto Industry Co Ltd v Amdac (M) Sdn Bhd* [2017] 11 MLJ 513; [2017] 5 CLJ 371 at para 59.

A daily fine may be imposed for a 'continuing' contempt of court which has not yet to be purged by the contemnor — *BYD Auto Industry*, at para 59;

(e) a custodial sentence may be ordered for a contemnor. Neither the RC nor any written law in Malaysia provides for a maximum imprisonment sentence for contempt of court.

According to s 14(1) of the United Kingdom's Contempt of Court Act 1981 ('the CCA (UK)'), a court in England and Wales can commit a person to prison for contempt of court for a term not exceeding two years for committal by a superior court and a term not exceeding one month in the case of committal by an inferior court. Section 12(1) of the India's Contempt of Courts Act 1971 ('the CCA (India)') provides that Indian courts can only impose an imprisonment sentence up to six months and/or a fine not exceeding 2,000 Indian Rupees. It is hoped that our legislature may provide for a maximum imprisonment and fine sentence for contempt of court along the lines of CCA (UK) and CCA (India); and

(f) the court may order a contemnor to pay costs of the committal proceedings to the applicant under O 59 rr 3(1) and/or (2) of the RC. Costs may be awarded on a standard basis (please see O 59 r 16(2)(a) and (3) of the RC) or an indemnity basis (please refer to O 59 r 16(2) and (4) of the RC). In the English High Court case of *EMI Records Ltd v Ian Cameron Wallace Ltd and another* [1982] 2 All ER 980 at p 984, Robert Megarry VC (sitting with the Chief Taxing Master and Mr Harvey Crush as assessors) explained that the court may award costs on an indemnity basis in cases of contempt of court.

Order 59 r 24 of the RC provides the court's discretionary power to grant interest on costs from the date of award of costs until the date of full payment of costs.

[26] Learned counsel for the applicants and respondent have cited many cases regarding the appropriate sentence to be meted by the court to the respondent for a breach of the ex parte restraining order. Sentences are imposed for contempt of court in the exercise of the courts' discretion. The exercise of such a discretion is dependent on the particular facts of the case in question. As such, cases regarding sentences meted for contempt of court provide mere guidelines and cannot constitute binding legal precedents from the view point of the stare decisis doctrine.

[27] The respondent's learned counsel has advanced the following mitigation in support of a security for good behaviour or in the alternative, a fine not exceeding RM10,000 (respondent's plea in mitigation):

(a) the deletion was not a deliberate act by the respondent. At worst, the respondent had acted recklessly by deleting the folder from his laptop;

(b) the deletion did not interfere with the administration of justice in this case;

(c) the respondent is remorseful;

(d) the respondent had subsequently done the 'right thing' by:

(i) agreeing to the consent order and by affirming the respondent's compliance affidavit; and

(ii) providing the thumb drive to Siaga;

(e) encl 41 concerns a 'civil contempt' and does not involve the commission of an offence;

(f) this is the first time the respondent has breached a civil court's order;

(g) if the court imprisons the respondent, this will cause irreparable harm to the respondent's bright future. The respondent is a university graduate who has a good extra-curricular record. He is presently 36 years old and has an exemplary work record. Four testimonials regarding the respondent's good character have been tendered to this court;

(h) the respondent is the eldest in his family and is the main income earner for his younger sister, younger brother and retired parents; and

(i) the respondent tenders his apology to court regarding his breach of the ex parte order.

[28] I have considered the respondent's plea in mitigation. Regrettably, I am unable to:

(a) suspend the execution of a committal order against the respondent;

(b) discharge the respondent;

(c) order the respondent to furnish a security for good behaviour; and

(d) fine the respondent.

On the facts of encl 41, the just and appropriate sentence for the respondent is a seven days' imprisonment sentence ('imprisonment sentence'). The imprisonment sentence is based on the following evidence and reasons:

(a) to preserve relevant evidence for the just determination of a case, a plaintiff may apply to court for an ex parte order to compel a defendant to deliver documents and real evidence to the plaintiff for the purpose of the trial of the case (ex parte delivery order). In the English High Court case of *Lock International plc v Beswick & Ors* [1989] 1 WLR 1268, at p 1281, Hoffmann J (as he then was) has explained that in many cases, it will be 'sufficient' for the court to grant an ex parte delivery order, rather than an ex parte Anton Pillar order (which is draconian in effect). The efficacy of an ex parte delivery order is wholly dependent on an ex parte restraining order which restrains a defendant from removing, destroying, dissipating or concealing relevant evidence (which the defendant is compelled by the ex parte delivery order to deliver to the plaintiff). It is to be noted that evidence obtained by the execution of an ex parte delivery order may not necessarily assist a plaintiff but may also be of use to the defendant or co-defendant at the trial in question.

The effectiveness of ex parte delivery orders is accentuated by the wide use of electronic devices in this digital age. Concomitantly, there is the high risk and 'danger' of deletion of evidence (which may be relevant to the trial of a case) from electronic devices.

In this case, the applicants could have applied for an ex parte Anton Pillar order against the respondent but the applicants chose to apply for the ex parte delivery order. It is in the public interest for all defendants to comply strictly with ex parte restraining orders. If a defendant breaches an ex parte restraining order, such as in this case (by way of the deletion), this may defeat the very purpose of the ex parte delivery order. Accordingly, it is in the public interest for this court to impose the imprisonment sentence so as to send a clear message that all parties in proceedings shall obey strictly ex parte restraining orders (so as to ensure that ex parte delivery orders are not frustrated). The public interest to ensure strict compliance with the ex parte restraining order in this case, clearly outweighs the respondent's plea in mitigation;

(b) the imprisonment sentence is meted to deter all parties in other proceedings from breaching ex parte restraining orders in a manner which will defeat ex parte delivery orders (public deterrence). The need for public deterrence in this case, prevails over the respondent's plea in mitigation;

(c) no expert evidence has been adduced by the respondent to show that the contents of the deleted files are the same contents of the thumb drive (given by the respondent to Siaga). In other words, by the deletion, the applicants had been deprived of their right to adduce at the trial of this case the contents of the deleted files as evidence in support of the applicants' suit. This constitutes an unjust interference with the administration of justice in this case;

(d) as explained in the above sub-para 24(2), the deletion is intentional. There is no mitigation that the deletion had been done inadvertently or even recklessly; and

(e) the respondent did not show genuine remorse because he did not admit that he had breached the ex parte order at the first case management of encl 41. On the contrary, the respondent raised various defences by filing two affidavits and a written submission to oppose encl 41 (please see the above para 14). In other words, the respondent had caused the applicants to expend much time, expense and effort to prove encl 41 beyond all reasonable doubt. Needless to say, judicial resources have been expended in respect of encl 41. The respondent only tendered his apology to court after the court has found him liable for contempt of court.

I must add that if not for the respondent's plea in mitigation, this court would have ordered an imprisonment sentence in excess of seven days for the respondent.

[29] In addition to the imprisonment sentence:

(a) subject to an allocatur fee, the respondent shall pay RM20,000 to the plaintiffs as costs for encl 41 ('costs'); and

(b) the respondent shall pay to the applicants interest at the rate of 5%pa on the costs from the date of imposition of the imprisonment sentence until the date of full payment of the costs.

STAY OF EXECUTION OF IMPRISONMENT SENTENCE

[30] Upon an oral application by the respondent's learned counsel, I grant a stay of execution of the imprisonment sentence ('stay') pending the disposal of the respondent's appeal to the Court of Appeal against the imprisonment sentence (the respondent's appeal). The stay is granted subject to the condition that a surety (who is not the respondent) provides a bond sum to the court to ensure the respondent's presence at the hearing and disposal of the respondent's appeal.

SUMMARY OF THE COURT'S DECISION

[31] In summary:

(a) by reason of O 45 r 7(6)(b) of the RC, the applicants were not required under O 45 r 7(2)(a) of the RC to serve personally a copy of the sealed ex parte restraining order on the respondent when the respondent had been notified of the ex parte restraining order by the applicants' email dated 3 November 2015. Additionally or alternatively, the applicants had

served personally a copy of the sealed ex parte order on the respondent by way of the applicants' email dated 3 November 2015 within the meaning of O 45 r 7(2)(a) read with O 62 r 3 of the RC;

(b) the respondent cannot rely on a defence that he had not been legally advised at the time of the deletion. On the facts of this case, there is proof beyond all reasonable doubt that the respondent had intentionally breached the ex parte restraining order by deleting the folder; and

(c) the imprisonment sentence is appropriate in the public interest and to ensure public deterrence.

Order accordingly.

Reported by Mohd Kamarul Anwar